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No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case provides an ideal vehicle for resolution by this Court of two important questions of federal law that have vexed the lower courts. As respondents themselves are forced to concede:

- The United States has explicitly recognized that both questions presented are "of exceptional importance."
- The United States has explicitly recognized that both questions presented have split the circuits.
- The United States has explicitly recognized that both questions were wrongly decided in this case.

Respondents advance three unpersuasive reasons why this Court should nonetheless deny the petition. First, respondents contend that both questions presented have already been settled by this Court. As explained *infra* (at 2-4, 8-9), this contention is unfounded. Second, respondents dispute the United States' position that both questions presented are of exceptional importance and have split the circuits. As explained *infra* (at 4-7, 9-10), respondents are wrong. Finally, respondents advance several merits-based arguments in support of the Fourth Circuit's resolution of both questions presented. Of course, petitioner disagrees with these merits-based arguments[1] and will respond in detail if this Court grants review. But for present purposes, the

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[1] For example, respondents do not attempt to refute – much less, address – the United States' argument that the Fourth Circuit's resolution of the 502(a)(2) Question directly contravenes the plain meaning of the statute. *See* Sec'y of Labor Amicus Br. in Support of Petition for Rehearing and Rehearing *En Banc* at 4-11, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359 (CA4 2006) (No. 05-1756), 2006 WL 2050799 (hereinafter, "U.S. *LaRue* Br."); *see also* Pet. 13-15 (advancing the argument of the United States that "the panel's resolution of the 502(a)(2) Question is 'unsupported under the statute.'"); Seven Law Professors Amici Br. in Support of Petitioner at 4-8 (hereinafter, "Law Prof. Br.") (cogently explaining and advocating the position advanced by the United States on the 502(a)(2) Question)).

significance of these arguments and their responses is that they replicate the fundamental differences among the views of the lower federal courts and highlight the need for immediate resolution by this Court.[2]

I. THE 502(a)(2) QUESTION MERITS REVIEW.

A. The 502(a)(2) Question is an open one.

Respondents' principal argument against review of the first question presented is that "[t]he court of appeals' resolution of the 502(a)(2) Question is a straightforward and unremarkable application of controlling [Supreme Court] precedent." BIO 5. Respondents' position is unfounded.

The only time that this Court interpreted the scope of § 502(a)(2) was over twenty years ago in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).[3]

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[2] Unsurprisingly, respondents do not seriously argue that this case is an inappropriate vehicle for resolution of either question presented. With respect to the 502(a)(2) Question, respondents do claim (in passing) that "Petitioner's § 502(a)(2) claim was made for the first time on appeal." BIO 5. As thoroughly explained by *amici* law professors, however, "the Fourth Circuit declined to rest its holding on an alternative fact-bound argument (*i.e.*, waiver) advanced by the respondents, instead resting its holding exclusively on its interpretation of Section 502(a)(2)." Law Prof. Br. 15. Respondents concede as much when they note (BIO 5) that the Fourth Circuit merely "*suggest[ed]* this claim may have been waived" and then proceeded to decide the 502(a)(2) Question on the merits. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (observing that any issue "pressed *or* passed upon below" is appropriate for review (emphasis added)). In any event, respondents' suggestion that petitioner did not raise the 502(a)(2) Question in the district court is factually wrong, as evidenced by the very documents attached by respondents to their BIO. *See, e.g.*, BIO App. 47a (petitioner's reply to respondents' motion to dismiss) (quoting and describing *the precise statutory language at issue in the 502(a)(2) Question* as "legally, exactly on point").

[3] Like the instant case, *Russell* involved a dispute over the scope of § 502(a)(2) and turned on the interpretation of certain language in § 409(a). That, however, is where the similarities between the two cases end. The case at bar turns on the question of what constitutes a "loss[] to [an individual account] plan" for purposes of the requirement in § 409(a) that a breaching fiduciary "shall be personally liable to make good to

In arguing that the 502(a)(2) Question is controlled by *Russell*, respondents seize upon the pronouncement in that case that a "recovery for a violation of § 409 [must] inure[] to the benefit of the plan as a whole." *Id.* at 140. As respondents are well aware, however, there is widespread disagreement regarding what constitutes a recovery that "inures to the benefit of the plan as a whole" *in the context of individual account plans. Id.*

For example, the United States has long taken the precise position urged by petitioner in this case that the diminution in value of even a single participant's interest in an individual account plan constitutes a "loss[] to the plan" under § 409(a) and is remediable under § 502(a)(2).[4] The United States has repeatedly explained why this is consistent with *Russell:*

> The district court made too much of *Russell's* reference to "the plan as a whole" in concluding that relief under section § 409 is not available. * * * *Russell* was simply distinguishing * * * relief paid directly to the plan for losses that occurred inside the plan (such as damages for plan asset mismanagement) from relief to be paid directly to individuals for losses occurring outside of the plan (such as damages for personal pain and suffering caused by a benefit payment delay).[5]

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such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). At issue in *Russell* was the question of whether damages for personal injuries—as opposed to plan losses—were recoverable under §§ 502(a)(2) and 409(a).

[4] *See, e.g.*, U.S. *LaRue* Br. 7-8 (arguing that "if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language" and that "there is no principled way to distinguish between the wrongful failure to pay a single participant's contribution into a plan and the wrongful failure to carry out a single participant's directed investment instructions.").

[5] *E.g.*, Sec'y of Labor Amicus Br. at 12, *Milosfsky v. American Airlines, Inc.*, 418 F.3d 429 (CA5 2005) (No. 03-11087), *available at*

Respondents' characterization of the Fourth Circuit's resolution of the 502(a)(2) Question as "a *straightforward* and *unremarkable* application of" *Russell* is particularly meritless given that the United States argued vigorously against such an application *in this very case*:

> Contrary to the panel's decision, allowing LaRue's suit to proceed under section 502(a)(2) is entirely consistent with the Supreme Court's decision in *Russell* in which the Court stated that a recovery under section 502(a)(2) must "inure[] to the benefit of the plan as a whole." * * * [W]hen the Supreme Court stated in *Russell* that recoveries under sections 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," there is every reason to believe that the Court had in mind suits, such as this one [by petitioner], where, if the plaintiffs' allegations are true, the plan holds fewer assets in trust due to the fiduciaries' mismanagement of the investment of some of the plan's assets, and thus has suffered "losses" under section 409.

U.S. *LaRue* Br. 10-11 (quoting *Russell*, 473 U.S. at 140).

B. The 502(a)(2) Question has split the circuits.

Respondents concede, as they must, that the United States has taken the position that the Fourth Circuit created a circuit split on the 502(a)(2) Question. BIO 7; U.S. *LaRue* Br. 11-14 (arguing that the Fourth Circuit decision in this case "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits.").

Respondents argue, however, that the United States is wrong and that "[t]he court of appeals' determination of the 502(a)(2) Question does not create a circuit conflict." BIO 7. According to respondents, there is no conflict because the cases cited by the United States "involve actions brought on

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http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.pdf (hereinafter, "U.S. *Milofsky* Br.").

behalf of a class of similarly-situated participants and/or on behalf of the plan itself, in factual scenarios where the alleged fiduciary breach involved misbehavior affecting a considerable segment of plan participants." *Id.*

As an initial matter, it bears mention that respondents' claim that the cases cited by the United States involved "factual scenarios where the alleged fiduciary breach involved misbehavior affecting a *considerable segment* of plan participants" is yet another shocking misrepresentation. In *Milofsky v. American Airlines, Inc.*, for example, a panel of the Fifth Circuit noted that the lawsuit was brought by "*a small segment* of the employees" in the plan and that the claim "by its very nature, can only benefit them." 404 F.3d 338, 345 (CA5 2005) (emphasis added), *rev'd en banc*, 442 F.3d 311 (CA5 2006). The panel went on to make clear that the case was *not* one "affecting a *considerable segment* of plan participants" when it wrote:

> We need not speculate on every possible situation in which a suit that demands relief beneficial to a large proportion of the beneficiaries can reasonably be said to "protect the entire plan." Instead, it is enough to say, for present purposes, that the specific relief here requested, affecting only 218 individual accounts out of a much larger plan, is much too narrow to qualify.

Id.

To be sure, respondents are correct in their observation that the Third, Fifth, Sixth, and Seventh Circuit cases cited by the United States—unlike the case at bar—involve more than just one aggrieved plan participant. But as explained by *amici* law professors, this "distinction misses the point" because "the *reasoning* employed by these other courts of appeals would directly foreclose the position adopted by the Fourth Circuit in this case." Law Prof. Br. 12, 13 (emphasis in original). Put simply, the same reasoning that permitted

218 pilots in the $4 billion plan[6] sponsored by an employer with over 85,000 employees[7] to sue under § 502(a)(2) to recover plan losses attributable to their 218 individual accounts in *Milofsky* would necessarily permit a single individual (*i.e.*, petitioner) in a small plan sponsored by an employer with only 300 employees[8] to sue under § 502(a)(2) to recover plan losses attributable to his individual account in this case.

C. The 502(a)(2) Question is exceptionally important.

Respondents' final argument against review of the first question presented is that "[t]he § 502(a)(2) Question is not an issue of exceptional importance." BIO 9. The manifest importance of the question, however, is evidenced by respondents' failure to contest the following empirical claims made in the petition:

- "*[A]pproximately $3 trillion in assets*—more than half of all private pension funds in this country—are currently held by defined contribution plans like the 401(k) plan in this case." Pet. 12.
- "Under the Fourth Circuit's interpretation of 502(a)(2), the breaching fiduciary of a 'defined contribution plan' will now enjoy total immunity from personal liability for monetary losses caused by even the most egregious violation of ERISA provided that the fiduciary's misconduct has only depleted the retirement funds of a single participant in the plan." *Id.* at 11.

Rather than contest these unassailable claims, respondents attempt to minimize their importance by suggesting that the Fourth Circuit's resolution of the

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[6] *See* AMR Corp., Annual Report (Form 11-K), at 7 (Dec. 31, 2002), *available at* http://www.secinfo.com/d61m.219.htm.

[7] *See* Yahoo! Finance Profile for AMR Corp., http://finance.yahoo.com/q/pr?s=AMR.

[8] *See* Introduction to DeWolff, Boberg & Assocs., http://www.dewolffboberg.com/abt_intro.htm.

502(a)(2) Question will not apply to cases in which more than one participant seeks relief under the statute. BIO 9-10 (stating that "[a]lthough the Secretary of Labor also hypothesized collateral consequences in her *amicus* brief supporting the petition for rehearing, the Secretary's larger concern clearly focuses on the ability of a *group* of plan participants to bring a § 502(a)(2) claim to recover monetary losses to the plan * * * But the court of appeals' decisions gives no reasons for the Secretary's disquietude.")

Respondents' characterization of the scope of the Fourth Circuit's holding is simply wrong. *See* Pet. 12 n.25 (quoting the United States' explanation regarding the inability to "draw a line between this case and the many other cases involving" groups). Indeed, the Fourth Circuit's decision has already been applied where more than one participant sought relief under the statute. *See Tullis v. UMB Bank, N.A.*, — F. Supp. 2d —, 2006 WL 3392749, *3-*5 (N.D. Ohio Nov. 21, 2006). But even if respondents' characterization were correct, the 502(a)(2) Question would nonetheless be of sufficient importance to warrant immediate review by this Court. As explained in the petition, the risk of "'single-participant' monetary losses resulting from fiduciary breach inheres in a 'defined contribution plan.'" Pet. 11. Respondents do not even attempt to dispute this fact or its significance. Nor could they. Approximately 91 percent of all private retirement plans have fewer than 100 participants. These 632,520 plans have $360 billion in assets and cover 14 percent of all active participants, approximately 9.2 million people. *See A More Secure Retirement for Workers: Proposals for ERISA Reform: Hearing Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce*, 106th Cong., 2d Sess. (2000) (statement of John Hotz, Deputy Director, Pension Rights Center), 2000 WL 276410.[9]

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[9] Respondents also suggest that victims of a fiduciary breach can still seek non-monetary remedies such as removal of a breaching fiduciary.

II. THE 502(a)(3) QUESTION MERITS REVIEW.

A. The 502(a)(3) Question is an open one that has split the circuits.

Respondents' first argument against review of the 502(a)(3) Question is that the court of appeals' holding is compelled by this Court's decisions in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). BIO 13. Once again, respondents are mistaken. As explained in the petition, the United States Solicitor General advanced in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004)—a case post-dating both *Mertens* and *Great-West*—the precise interpretation of 502(a)(3) urged by petitioner in this case.[10] Although the *Aetna* Court did not reach the 502(a)(3) Question, it made clear that the issue was very much an open one.[11]

See BIO 9; *see also id.* at 2, 13 (suggesting that "Petitioner could have sought injunctive relief 'compelling compliance with his investment instructions.'"). Such remedies are of little value to those—like petitioner—who have *already* incurred monetary losses as a result of fiduciary misconduct or negligence. Respondents suggest that the lack of any monetary remedy was a considered decision made by Congress. Such a claim—one that petitioner disputes—goes to the *merits* of the 502(a)(2) Question, not to its importance.

[10] It is the position of the United States and petitioner that the remedy of "surcharge"—*i.e.*, "make whole" monetary relief against a breaching fiduciary—satisfies the strict test established in *Mertens* and clarified in *Great-West*. *See* U.S. Amicus Br. at 27-28 n. 13, *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (Nos. 02-1845 & 03-83), 2003 WL 23011479.

[11] *See, e.g.*, Michael H. Bernstein, *A New Battleground for Patient Suits Against HMOs? We May Not Have Heard the End of ERISA Litigation Concerning So-Called Negligent Benefit Denials*, 178 N.J.L.J. 1048 (2004) (noting that in the "landmark decision" of *Aetna* "[t]he Supreme Court scrupulously avoided a discussion of potential liability under ERISA § 502(a)(3) and § 502(a)(2). However, given footnotes 1 and 7 of Justice Thomas' opinion, along with the concurring opinion of Justice Ginsburg concerning possible remedies available under ERISA

Respondents argue that "*Aetna* neither opened any doors to the 502(a)(3) Question nor challenged this Court's well-established decisions in both *Mertens* and *Great-West*." BIO 14. To be sure, respondents' narrow reading of *Mertens* and *Great-West* has now been adopted by three courts of appeals including the Fourth Circuit in this case. But it has also been expressly rejected by the United States,[12] leading scholars,[13] and the Seventh Circuit.[14]

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§ 502(a)(3), these two sections may become the new battleground for plan participants").

[12] Since *Aetna*, the United States Department of Labor has advanced its interpretation of 502(a)(3) before the First, Second, Fourth, Fifth, Seventh, Ninth Circuits, and Tenth Circuits. *See* Sec'y of Labor Amicus Br., *Green v. Exxonmobile Corp.*, 470 F.3d 415 (CA1 2006) (No. 06-1452), 2006 WL 3226460; Sec'y of Labor Amicus Br., *Coan v. Kaufman*, 457 F.3d 250 (CA2 2006) (No. 04-5173), 2005 WL 5071038; Sec'y of Labor Amicus Br., *Pereira v. Farace*, 413 F.3d 330 (CA2 2005) (Nos. 03-5035, 03-5055), *available at* http://www.dol.gov/sol/media/briefs/pereirabrief.pdf; U.S. *LaRue* Br. (CA4); U.S. *Milofsky* Br. (CA5); Sec'y of Labor Amicus Br., *Ostler v. OCE-USA, Inc.*, No. 01-3801 (CA7 Feb. 8, 2002), 2002 WL 32305162; Sec'y of Labor Amicus Br., *Goeres v. Charles Schwab & Co.*, No. 05-15282 (CA9 July 12, 2005), *available at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf; Sec'y of Labor Amicus Br., *Callery v. United States Life Ins. Co. in the City of New York*, 392 F.3d 401 (CA10 2004) (No. 03-4097), 2003 WL 24309395.

[13] *See, e.g.*, Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827 (2006) (arguing in favor of the United States' position and noting that "[t]he Supreme Court's major prior precedents interpreting Section 502(a)(3), when stripped of superfluous *dicta* [are] consistent with * * * the Department of Labor's long-standing litigation position.").

[14] As explained in the Petition, the United States has acknowledged the circuit split on this issue. Pet. 23-24. Respondents argue that "*Great-West* effectively eliminated any conflict over this issue" and that the United States' assertion of a split "rel[ies] chiefly on two appellate court decisions issued before *Great-West*." BIO 12. Notably, respondents fail to dispute (or even mention) that "[t]he Seventh Circuit recently reaffirmed its position." Pet. 24.

B. The 502(a)(3) Question is exceptionally important.

The extraordinary importance of the 502(a)(3) Question cannot credibly be denied. As the American Association of Retired Persons (AARP) recently noted, resolution of the 502(a)(3) Question

> will have a direct and vital bearing on the ability of [the 35+ million] AARP members and other Americans to police and protect their pension plans from mismanagement and to ensure monies for those benefits which will foster their economic security.[15]

Nonetheless, respondents assert that the 502(a)(3) Question is not of exceptional importance. But respondents' only support for this claim is the implausible contention that "[t]he Secretary did not request reconsideration of the 502(a)(3) Question in her *amicus* filing in the court of appeals, suggesting no institutional concern regarding the court of appeals' determination of this issue." BIO 12. As demonstrated *supra* (at 9 n.12), the Secretary has made litigation of the 502(a)(3) Question a top priority. Moreover, the Secretary elected to assert the position of the United States on the 502(a)(3) Question in this very case notwithstanding that *petitioner* had decided not to seek rehearing on that issue before the Fourth Circuit.[16]

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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[15] AARP Amicus Br. at 2, *Coan v. Kaufman*, 457 F.3d 250 (CA2 2006) (No. 04-5173), 2005 WL 5071037.

[16] *See* U.S. *LaRue* Br. 11 ("Although it is not an issue on rehearing, the Secretary also disagrees with the panel's conclusion that section 502(a)(3) likewise precludes the recovery of monetary losses for a fiduciary breach. Instead, it is the Secretary's position that make-whole relief against a breaching fiduciary, known in equity as 'surcharge,' is available under section 502(a)(3).").

Respectfully submitted.

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